APPENDIX A

Federal Trade Commission Docket 6485
United States Court of Appeals
For the District of Columbia Circuit

No. 20,058

TEXACO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 20,061

THE B. F. GOODRICH COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petitions to Review an Order of the Federal Trade Commission

Decided September 25, 1967

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and BURGER, *Circuit Judge.*

BURGER, *Circuit Judge:* Eleven years after the issuance of a complaint and sixteen years after an investigation was initiated,[1] this case returns to us from

[1] The investigation was originally instituted in 1936 but was inactive for many years. Serious investigation was renewed between 1949 and 1951 and from 1951 on all six companies

the Federal Trade Commission for the second time; in the interim, following our prior review, the Supreme Court remanded for further consideration. *See Texaco, Inc.* v. *F.T.C.,* 118 U.S. App. D.C. 366, 336 F. 2d 754 (1964), *remanded,* 381 U.S. 739 (1965).

In 1956 the Federal Trade Commission brought proceedings against major oil and rubber companies, simultaneously instituted by substantially identical complaints, alleging as an unlawful method of competition prohibited by Section 5 of the Federal Trade Act, 38 Stat. 719 (1914), 15 U.S.C. § 45 (1964), the sales commission method of distributing tires, batteries, and accessories, called the "TBA" plan. Under that plan the tire and rubber companies pay commissions to the oil companies on sales of the tire companies' TBA to the oil companies' dealers. Each complaint paired one of the large tire and rubber product manufacturers and a large oil company with which it had contracted. The pairings were Texaco and B. F. Goodrich, Shell and Firestone, and Atlantic and Goodyear.[2]

(1) *Background.* In 1961 the Commission rendered separate decisions in each of the three TBA cases. In both *Atlantic-Goodyear*[3] and *Shell-Firestone,*[4] the Commission found coercion, unlawful tie-ins, and ad-

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were the subject of a single joint investigation which was completed in 1954. *See Hearings Before Subcommittee No. 1 of the House Select Committee on Small Business on the Organization and Procedures of the Federal Regulatory Commissions and their Effect on Small Business,* 84th Cong., 1st Sess. 447-48 (1956).

[2] The pairings were based on the most substantial agreements challenged, although the complaints also challenged the contracts of each respondent with other oil and tire companies not parties to the particular actions.

[3] 58 F.T.C. 309 (1961).

[4] 58 F.T.C. 371 (1961).

verse competitive effects resulting from the TBA sales commission agreements. In contrast, however, the Commission in *Texaco-Goodrich*[5] found no coercion and remanded the case to the Hearing Examiner for additional evidence on anticompetitive effects.[6] One year later the Examiner filed a revised decision in which he added new findings and reached new and contrary conclusions without complying with the Commission's directive to take additional evidence.

Prior to the second decision, because of statements made about the then pending case by Commission Chairman Paul Rand Dixon to the National Congress of Petroleum Retailers, Inc. in Denver, Colorado, on July 25, 1961, Texaco filed a motion before the Commission that Chairman Dixon withdraw from participating or that he be disqualified. The motion was denied and Chairman Dixon participated in the decision. On April 15, 1963, the Commission affirmed the new conclusions of the Examiner that the agreements

[5] 58 F.T.C. 1176 (1961).

[6] The Commission's first remand order declared:

> The determination of whether Texaco's exercise of such economic power in favor of Firestone and Goodyear under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon *the competitive effects* of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the exercise of overt coercive tactics or by more subtle but equally effective means. 58 F.T.C. at 1178 (emphasis in the original).

Only one member of the Commission who had participated in the 1961 remand for additional evidence was on the Commission when the case came back in 1963; he dissented on the ground that the Examiner had failed to comply with the Commission's remand order. The order had explicitly directed the Examiner to take additional evidence on the sales agreement which the Commission considered indispensable to its disposition of the case.

were unlawful,[7] but offered no explanation for doing so without the new evidence earlier thought necessary.

On appeal from the second Commission decision this Court in 1964 unanimously held that

> Chairman Dixon's participation in the hearing amounted * * * to a denial of due process which invalidated the order under review * * *. His Denver speech, made before the matter was submitted to the Commission * * * plainly reveals that he had already concluded that Texaco and Goodrich were violating the Act * * *.

Supra at 372, 336 F. 2d at 760. In the Supreme Court the Solicitor General did not challenge this Court's conclusion of disqualifying bias on the part of the Commission Chairman. With respect to the merits, a majority of this Court held that there had been a fundamental failure of proof. Our opinion stated:

> We see nothing illegal or even unethical in the payment of commissions for such services, *except in instances where an oil marketing company forces its dealers through coercive tactics or controlling economic power to buy the sponsored products. Neither of these inferences was proved in this case, and it may not be presumed that either will exist in future similar situations.*

Id. at 375, 336 F. 2d at 763 [emphasis added]. We dismissed the complaint because of this lack of proof and because the undue protraction of the administrative process constituted a denial of due process.

Meanwhile, the Seventh Circuit affirmed the Commission in the *Atlantic* case, *Goodyear Tire and Rubber Co. v. F.T.C.*, 331 F. 2d 394 (7th Cir. 1964), and the alleged conflict between this Circuit and the Sev-

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[7] B.F. Goodrich Co., Docket No. 6485, 62 F.T.C. 1172, 1197 (1963).

enth Circuit was asserted in the petition for certiorari. The writ was subsequently granted.[8]

In *Atlantic Refining Co.* v. *F.T.C.*, 381 U.S. 357 (1965), the Supreme Court affirmed the Seventh Circuit holding that the Atlantic TBA sales commission agreements were an unfair method of competition. One week later in a *per curiam* opinion the Court granted the Commission's petition for a writ of certiorari in *Texaco,* and remanded with instructions

> to remand it immediately to the Federal Trade Commission for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co.* v. *Federal Trade Commission, ante,* p. 537.

381 U.S. 739 (1965). Pursuant to the remand from this court, the Commission[9] issued an order on June 18, 1965 (a) vacating its prior 1963 decision, (b) denominating the proceedings before the Commission as appeals from the Examiner's 1962 decision, (c) permitting oral argument and the filing of briefs, and (d) instructing counsel to "focus on the question whether the facts of record in the present case bring it within the Supreme Court's decision in the *Atlantic Refining Co.* case." *Order of the Federal Trade Commission Vacating Prior Decision and Order and Setting Hearing on Remand,* In the Matter of The

[8] The *Shell-Firestone* proceedings before the Fifth Circuit had been held in abeyance pending the Supreme Court resolution of the alleged conflict in circuits.

[9] Chairman Dixon, having been disqualified did not participate nor did Commissioner MacIntyre. Thus only three Commissioners have participated in the opinion and order now under review. None of the three members participating were members of the 1961 Commission which directed the Examiner to take additional evidence on the competitive effects of the sales commission contracts.

B.F. Goodrich Co. and The Texas Co., Docket No. 6485, June 18, 1965.

In January, 1966, the Commission entered an order and filed an opinion, which is the subject of this appeal. The Commission held:

> In our view the Supreme Court's decision in *Atlantic* compels the conclusion that the Texaco-Goodrich plan is an unfair method of competition and that Texaco and Goodrich, as were Atlantic and Goodyear, should be prohibited from performing or entering into any other sales commission plans.

— F.T.C. —, — (1966). The Commission thus held that the sales commission agreement involved here was indistinguishable in fundamental operation and effect from the one held unlawful in *Atlantic*.

(2) *Contentions*. The Commission contends that (1) the TBA sales commission system is inherently unlawful without regard to any acts of overt coercion and argues that this is implicit in the remand in light of *Atlantic*; (2) by its use of the sales commission system, Texaco has in fact exercised its economic power over its dealers in favor of Goodrich sponsored products; and (3) the sales commission system has given Goodrich an unfair competitive advantage.

Texaco's position is (1) that the coercion provision of the Commission's latest order entered against Texaco is not justified on the record; (2) that this order is erroneous independent of the sales commission program; and (3) that the Supreme Court's remand to the Commission required that the asserted illegality of Texaco's sales commission program be re-determined in light of *Atlantic*; furthermore, that illegality under the *Atlantic* holding can be shown only by proof that Texaco coerced dealers to purchase sponsored merchandise and that anticompetitive effects followed. Additionally, Texaco contends that the administrative

process has been abused by the unduly long drawn out nature of the proceedings and that this constitutes harassment and warrants dismissal of the proceedings independent of the merits.

We must now determine whether the Commission has complied with the remand order and correctly applied the applicable principles enunciated in the *Atlantic* holding.

(3) *The Atlantic Holding.* Our analysis must begin with the decision in *Atlantic.* In the *Shell-Firestone* case, the third TBA case decided after *Atlantic,* the Fifth Circuit interpreted the *Atlantic* rationale as based on three essential components, the application of each depending on the facts of the particular case before the court:

> (a) the oil company's dominant economic power over its dealers;
> (b) exercise of that power over its dealers;
> (c) anticompetitive effects of using that power.

Shell Oil Co. v. *F.T.C.,* 360 F. 2d 470, 477 (5th Cir. 1966), *cert. denied,* 385 U.S. 1002 (1967). Both the Commission and Texaco agree with this view of the *Atlantic* holding and this view was essentially adopted by the Solicitor General in the Supreme Court. Our consideration of *Atlantic* leads us to the same view as that of the Fifth Circuit in *Shell;* in short we conclude with Judge Wisdom that the Court hovered near the brink but did not lay down a per se rule.[10]

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[10] Several factors compel this conclusion. In the first place, although the Commission took the position that the sales commission contract was illegal *per se,* the Seventh Circuit implicitly rejected such a view, and the absence of the words "per se" in the *Atlantic* opinion "could hardly have been an accident." *Shell, supra* at 477.

Secondly, the Court has stated that when it has had no previous opportunity to assay the effects on competition of a

(a) Existence of Dominant Economic Power

In our prior opinion we found "no basis in the record for the Commission's conclusion that Texaco has controlling economic power over its dealers," *supra* at 374, 336 F. 2d at 762. In *Atlantic* the Court viewed the question of dominant economic power not only in terms of the statistical facts used to show economic dependence but also in terms of specific control devices: (1) control over oil and gas supply; (2) control over dealers through short term leases, equipment loans, etc.; (3) control over advertising; (4) leverage from financial promotion; and (5) housekeeping requirements of leases. Such devices have often been alluded to in demonstrating dominant economic power and leverage. *See, e.g., Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964); *United States* v. *Loew's, Inc.,* 371 U.S. 38, 45 (1962).

While the statistical material in the record here is ambiguous, the record fairly demonstrates what is a matter of common acceptance, that both Texaco and B. F. Goodrich are among the giants of their respective industries,[11] and as such control large economic leverage.

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new form of economic activity, it will not declare that activity illegal per se. *White Motor Co.* v. *United States,* 372 U.S. 253, 261 (1963); *see also* Mr. Justice Goldberg's dissenting opinion in *Atlantic,* 381 U.S. at 389–90. *But cf. United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365, 385–86 (1967) (Stewart, J., concurring in part and dissenting in part).

[11] The myriad figures present in our voluminous record support a statistical analysis which assumes dominant economic power. Similar statistics have been fully discussed in the *Shell* case. 360 F. 2d at 479–82 & nn. 21–23.

We think it is sufficient to note the following facts: Goodrich is one of our largest rubber product manufacturers and its sales in 1954, one of the years on which the complaint is based, exceeded $500 million dollars. Texaco sales in the same year ex-

Many, but not all, of the control devices mentioned in *Atlantic* are present to some degree here. Texaco, of course, controls the supply of oil and gas to its dealers, and the relatively heavy cost of constructing and maintaining a modern service station enables Texaco to maintain substantial economic leverage through the use of loans, short-term leases, and equipment financing. However. we agree with Judge Wisdom that "the dominance of a major oil company over its dealers comes from the leverage inherent in the structure and economics of the petroleum distribution system * * *" 360 F. 2d at 481.

(b) *Exercise of Dominant Economic Power.*

In our earlier opinion we concluded that on the whole record there was no substantial evidence that Texaco had exercised controlling economic power over its dealers, as the Commission had found. Similarly, after careful review of the record, we had concluded that there was no basis for a finding of coercion and that read as a whole the record demonstrated the contrary. We should note at the outset that nothing said by the Supreme Court in *Atlantic* bears on that hold-

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ceeded one and one-half billion dollars. The 30,000 Texaco stations which might be subject to the sales commission plan constituted some 16.5% of all service stations in the United States. Finally, from 1952 to 1956 Goodrich sales to all Texaco accounts rose from 12.7 million dollars to 18.9 million dollars. We think these not-insubstantial figures sufficiently support the requirements of a statistical analysis of dominant economic power.

We should make clear, however, our view that statistics alone would not be sufficient to support the finding that Texaco exercises dominant economic power. The statistical record supports our conclusion that the Commission has not set forth with sufficient clarity an adequate statistical record to sustain its other findings.

ing and nothing said by the Commission since the remand alters that conclusion.

We can glean nothing from the utterances of the Supreme Court which alters the basic rule that a finding of coercion is the threshold requirement of a determination of exercise of dominant economic power. As the Commission has noted, it did not ask the Supreme Court to review our holding that the record did not sustain a finding of coercion. Equally true is the fact that in the *Atlantic* case the Seventh Circuit's sustaining of the Commission's findings of coercion were not appealed. But, in spite of this lack of challenge by Atlantic and by the Commission in both cases, the Supreme Court in *Atlantic* did not ignore record evidence of Atlantic's coercive conduct. Indeed, that Court was well aware that the coercion was found to have permeated the entire Atlantic program, contaminating even its neutral conduct.

The Commission argues that Atlantic's coercion merely aggravated the restraint imposed by the sales commission plan. We do not so read *Atlantic*. If the Supreme Court concluded that the sales commission plan was inherently illegal when entered into by a major oil company, it would have had no occasion to take cognizance of the coercive practices and no remand of this case would have been required. Yet the *Atlantic* opinion is replete with references to these practices and we cannot escape the conclusion that the overt coercive acts practiced by Atlantic were deemed essential to the ultimate action of the Court. It is surely of some significance that in almost every page of the *Atlantic* opinion there is some such reference, *e.g.*, "overt acts," overt coercive pressures," "direct and overt threats," etc., 381 U.S. at 368, 373, 376.

The Commission now asserts that since it did not rely upon coercion as a basis for invalidating Texaco's sales commission agreements, the Supreme Court action vacating our judgment implies a total rejection of Texaco's position. The combination of *Atlantic's* emphasis on overt coercion, to which we have just alluded, the failure of the Commission to challenge our prior holding on this issue when seeking review, and the absence of any reference to the subject in the Supreme Court Per Curiam opinion on remand all tend strongly to negate the Commission's argument. Had the Commission urged on the Supreme Court a *per se* rule of illegality stemming from mere existence of economic power, its failure to challenge our holding on absence of coercion would be understandable.

We have difficulty reconciling the Commission argument with the fact of a remand in this case. If the Supreme Court viewed its holding in *Atlantic* as treating contractual arrangements between the oil company and its dealers in and out of themselves as giving rise to controlling economic power, and that mere salesmanship without any coercion constituted unlawful exercise of such power, there would have been nothing to remand. The Supreme Court could have simply reversed and reinstated the Commission's order.

Of course we realize, as did Judge Wisdom in *Shell*, that the "Company's use of its economic power through the sales commission plan to cause its dealers to buy sponsored TBA *even in the absence of overt coercion*" can constitute an unfair method of competition and a violation of section 5, *Shell* at 482–83 [emphasis added]. The Commission also recognizes this and therefore argues that each of the "non-coercive practices" referred to in *Atlantic* are present in equal degree in this case. The Commission argues that the

references to these practices in *Atlantic* compels a conclusion that even the non-coercive practices arising from the contractual relationship constitute the exercise of economic power over dealers. The Commission's contentions must be weighed against the Examiner's finding that Texaco dealers, unlike those of Atlantic and Shell, were free to accept or reject sponsored products. This view of the Examiner may have been influenced by the circumstance that only 5 former Texaco dealers testified to facts which would sustain a finding of coercive practices and more than 50 present and some former dealers testified to the contrary.

In light of all this we do not read *Atlantic* to conclude that the Court was condemning these practices as *per se* illegal. They were indicative of Atlantic's conduct, of a character not shown in this record, of marshalling "its full economic power in a continuing campaign to force its dealers and wholesalers to buy Goodyear products," 381 U.S. at 371. A few examples will suffice:

(1) *Sales Practices.* In *Atlantic,* the oil company

> was to instruct its salesmen to urge dealers to "vigorously" represent Goodyear, and to "cooperate with and assist" Goodyear in its efforts to promote and increase the sale" by Atlantic dealers of Goodyear products.

381 U.S. at 365. The Commission characterizes the evidence here as substantially identical. Yet the Examiner was satisfied that Texaco policy since at least 1948 has been to permit each dealer to choose whatever brand TBA he desires.[12]

[12] This policy in part states:

> The Texas Company's selling personnel are expected to become familiar with Firestone and Goodrich Inventory Guide Systems and TBA merchandise and the merchandising of TBA products generally. But it should be clearly

The Commission now argues that "on each visit, the [Texaco] salesman offers to write up sponsored TBA orders," but the Commission itself in the order presently under review struck the Examiner's finding that Texaco "salesmen were encouraged by [Texaco] management to write up orders for sponsored TBA without waiting for a formal request from a dealer."

(2) *Dual Solicitation and Advance Notification.* In *Atlantic* there was a regular practice of

> "double teaming" solicitation of Atlantic outlets by representatives of both companies to convert them to Goodyear products. They were to call on the dealers together, take stock orders, furnish initial price lists and project future quotas of purchases of Goodyear products.

381 U.S. at 365. The Commission contends such practices are prevalent in this record. The Examiner found that "double teaming" and advance solicitation—notice to the tire companies that a new station was about to become operable—were isolated and sporadic practices, not a regular or even frequent practice as was the case with Atlantic's operations. They appeared in *Atlantic* in the context of an entire system designed to overtly coerce its dealers. This is not the state of the record before us.

(3) *Dealer Policing and Credit Cards.* In *Atlantic* the

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understood that we will render equal assistance to all dealers in setting up and maintaining his own basic TBA stock assortment and Inventory Guide system along these lines regardless of the brand of merchandise handled. * * * [The Inventory Guide] is not applied in any manner whatsoever that would impair any dealer's freedom to purchase such brands and quantities of TBA merchandise as he desires.

Our dealers, consignees and distributors are independent businessmen, and instructions that no undue influence is to be used to interfere with their free and independent judgment remain unchanged.

Supreme Court was confronted with evidence that Atlantic imposed quotas on dealers and effectively policed them by the use of a reporting system of purchases and sales of TBA. In the original appeal to this Court, the Commission contended that the quota and policing system were also used by Texaco. In the present appeal the Commission has retreated from this position. As to credit card policy, the Examiner carefully distinguished the *Atlantic* record from the instant record and significantly found that Texaco does permit dealers to charge *non-sponsored* TBA on its credit cards.[13]

(4) *Geographical Supply Points.* In *Atlantic,* Goodyear required that Atlantic assign its dealers to a single point of TBA supply. This geographical division of supply points is not present in our record and, indeed, the Examiner found that as to sponsored TBA sales, each dealer did not buy exclusively from, and was not limited to, any particular supply point but was free to deal with any source he chose.

These few examples demonstrate a different set of facts between the *Atlantic* record and this case. On the basis of the record before us we cannot conclude that Texaco exploited its service station market illegally for the benefit of itself and Goodrich. In short, we do not find that Texaco used its controlling economic power to compel its dealers to purchase sponsored TBA.

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[13] Since 1955 Texaco practice is to permit deferred payment of sponsored TBA on credit. Thus, three months is permitted on purchases of $30 or more, six months on purchases of $50 or more. The Examiner held that this limitation of deferred payment to sponsored TBA was altogether reasonable and proper. But the record also shows that dealers continue to charge non-sponsored TBA on a monthly basis without a dollar limitation.

(c) *Anticompetitive Effects.*

Atlantic's third requirement for finding a violation of section 5 is that the TBA sales commission contracts must result in adverse competitive effects on the relevant market. As we have previously noted, the first Commission remand of the case to the Examiner in 1961 was because of the need for additional evidence on the issue of anticompetitive effects. We have further noted that no such evidence was forthcoming. In our prior review of this case we also found that evidence of anticompetitive effects was lacking.

The Commission urges the following three guidelines to be the essence of the *Atlantic* holding on anticompetitive effects:

> (1) Extensive economic analysis of the competitive effect based on examination of the entire TBA market is unnecessary.
>
> (2) Evidence of economic justification or benefit to the parties concerned is immaterial.
>
> (3) It is sufficient when the Commission finds that a substantial portion of commerce is affected.

This, of course, explains the Commission position that the TBA system is an "inherently anticompetitive" device from which "competitive injury must result." This is simply a renewed intimation of a *per se* rule in *Atlantic* and needs little discussion since we have already rejected that reading. It is true, of course, that the guidelines suggested by the Commission are referred to in the *Atlantic* opinion, *e.g.*, 381 U.S. at 370–371. But it is also true, as Judge Wisdom pointed out in his discussion of these guidelines, that the Court in *Atlantic* looked to the full record for examples of anticompetitive effects. 360 F. 2d at 483. Indeed, the Court was very clear on this point:

> The anticompetitive effects of this program are clear on the record and render unnecessary extensive economic analysis of market percentages or business justifications * * *

381 U.S. at 371.

Bearing in mind the Fifth Circuit's caveat of an overlap between a discussion of anticompetitive effects and the exercise of dominant economic power, we proceed to examine the record before us. As *Atlantic* noted, the question is whether the TBA system "impaired competition at three levels [manufacturing, wholesaling, and retailing] of the tires, batteries and accessories industry," *id.* at 370. And, of course, it goes without saying that the type of competition at these levels—interbrand and intrabrand—is highly relevant.

(a) Interbrand Competition

Under the TBA system interbrand competition manifests itself, if at all, most perceptively at the wholesale level. We recognize that wholesalers of competing TBA brands may well be substantially limited in selling their products to service stations under contract with major oil companies. The TBA system may deprive retailers of their freedom of choice as to the TBA products they may choose. Such competitive effects also reach back to the manufacturing level. For example, to the extent that wholesalers are unable to sell their products to service outlets, the manufacturers may suffer injury. To that extent producers' distribution systems may be impaired and expansion potential circumscribed.[14]

As an example of interbrand anticompetitive effects in *Atlantic* the Court found a classic division of ter-

[14] See Klaus, *Analysis of the Sales-Commission System of Tires, Batteries, and Accessories Distribution in Retrospect: Answers For An Incisive Dissent*, 44 Texas L. Rev. 890, 911 (1966).

ritories between Goodyear and Firestone, the two manufacturers involved: "Firestone and Goodyear were excluded from selling to Atlantic's dealers in each other's territories," 381 U.S. at 370. Flowing directly from this was the further adverse effect that Atlantic dealers could only buy at the prices designated by supplier to whom the territory had been allocated, *ibid.* Finally, there was little doubt but that the combination of these and other practices in the *Atlantic* record, including the resort to overt coercion, had the drastic anticompetitive effect of almost completely foreclosing the market to Altanic's own retailers and wholesalers who desired to sell brands other than sponsored products and to wholesalers and manufacturers of competing brands with similar desires.

We have earlier noted the fact that the record before us is devoid of evidence disclosing any form of territorial division of markets on the part of the sponsored manufacturers. And we have also referred to the long standing Texaco policy that Texaco dealers are free to purchase any brand of TBA which they desire to sell. *See* note 12, *supra.* Similarly, there is no evidence that any form of price dictation occurred.

But the most significant evidence on the question of interbrand anticompetitive effects concerns the testimony of Texaco dealers and sponsored and competing suppliers. The Commission relies upon testimony of former Texaco dealers and competing TBA suppliers to the effect that nonsponsored TBA could not be sold to Texaco dealers because of the dealer's understanding that they were required to purchase sponsored TBA. The Commission corroborates this testimony with "representative evidence" that in certain Texaco districts the percentage of dealers who carried sponsored TBA ranges from 70% to 89%. This evidence

and these figures were rejected by the Examiner in his original decision and by the first Commission decision. The Examiner's modification of this position, which as we noted was made with no new evidence, was affirmed by the second Commission decision, and this Court rejected those findings on the prior appeal as unsupported in the record. Nothing has developed to change our view, and indeed on remand the Commission has stricken the Examiner's finding. The Commission now limits its characterization of the testimony of competing suppliers to a statement that "practically all of the representatives of the competitors of Goodrich *called as witnesses* testified" that they were foreclosed from the Texaco service station market. We simply cannot regard this as "representative;" such a conclusion is not supported by substantial evidence, except in isolated instances which were generally contradicted by overwhelming rebuttal evidence. Nor can we accept the Commission view that the rebuttal testimony is to be discounted because witnesses are under "pressure" from Texas. A finding of pressure on witnesses before a tribunal is not one to be lightly inferred and ought not be made without evidence of some kind; none is suggested by the Commission on this score.

(b) Intrabrand Competition

A second form of competition, intrabrand, is the inevitable result of the supply point system noted in *Atlantic*. The adverse anticompetitive effects are similar to those found in interbrand competition—pricing, territorial market foreclosure, and full-line forcing.[33]

[33] In the *Atlantic* case the Seventh Circuit found that

> [B]oth Goodyear and Firestone said that they would refuse to sell only tires under the sales commission plan and insisted that they be allowed to handle batteries and accessories as well as their own products.

331 F. 2d at 398.

Without laboring the point, we have already noted that the record in the instant case simply cannot be said to reflect substantial evidence to support a finding that these practices exist in a measure adequate to demonstrate that the Texaco TBA contract causes adverse anticompetitive effects. We therefore hold that there is an absence of substantial evidence which supports a finding of anticompetitive effects.

The Commission maintains that the first Commission opinion remanding for evidence of anticompetitive effects was "enigmatic," and that it is enough that a substantial portion of commerce is affected under the rationale of *Atlantic.* Surely there is nothing obscure or ambiguous in a remand predicated on an absence of crucial evidence especially where the remand directs a further inquiry for relevant evidence. And we find no basis for treating the *Atlantic* case as carrying the test of quantitative substantiality to the brink of extremism by a strained literalism. Indeed, we are inclined to believe that the Commission views the situation, as the Commission opinion and brief candidly concede, as one in which it would be arbitrary and inequitable to bar Atlantic and Shell, who are very much like Texaco in broad outline, from use of the sales commission plan while permitting Texaco to continue its operation. We agree that it would be inequitable, and indeed a dereliction of the Commission's obligations, *provided* that all three were guilty of substantially equal violations of section 5. But simply because Texaco is in the same line of business does not mean it must suffer the pain of the misdeeds of other oil companies; this would indeed by guilt by association. We conclude that the record simply does not support a finding that Texaco violated the Act. We therefore hold that while the record shows Texaco indeed has dominant economic power, it is fatally defi-

cient on the crucial issues of exercise of that power and subsequent anticompetitive effects.

CONCLUSION

One course available to us would be to remand this case once again to the Commission to permit it to develop additional evidence for the record[16] but the Commission and Examiner have had abundant opportunity—and direct mandate—to do this in the past and have not done so. We think the time has now come to terminate these protracted proceedings and dismiss the complaint. We recognize that the Commission's obligations and the public interest in preserving competition are not to be lightly dealt with but the Commission has now had more than an adequate opportunity to develop a record in support of its section 5 contentions over a period of fourteen years. Accordingly, the Commission order under review is set aside and remanded to the Commission with directions to dismiss the complaint.

Reversed and Remanded.

[16] Even in a remand to the Commission for further proceedings it would have been imperative to make clear our view that the coercion aspect of the Commission order has no basis in law, or the record. Since we have twice determined there is no basis that Texaco overtly coerced any substantial number of dealers or that a pattern of coercion existed, the provisions of the order prohibiting such coercion were and are baseless.

APPENDIX B

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

Docket No. 6485

In the Matter of The B. F. Goodrich Company, and The Texas Company, corporations.

OPINION OF THE COMMISSION

By Commissioner Elman:

On April 15, 1963, the Commission held unlawful as an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act[1] a sales commission agreement between The B. F. Goodrich Company ("Goodrich") and Texaco, Inc. ("Texaco"). Under that agreement Goodrich pays Texaco a commission for promoting the sale of Goodrich tires, batteries, and automotive accessories ("TBA") to its retail gasoline dealers. By its order, the Commission enjoined Goodrich and Texaco from carrying out their agreement and from performing or entering into sales commission arrangements with

[1] Section 5 provides in relevant part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

any other companies. On review, the Court of Appeals for the District of Columbia Circuit set aside the Commission's order and directed the Commission to dismiss the complaint. *Texaco, Inc.* v. *F.T.C.*, 336 F. 2d 754 (D.C. Cir. 1964). On June 7, 1965, the Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and directed that the case be remanded to the Commission "for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co.* v. *Federal Trade Comm'n,* [381 U.S. 357 (1965)]." *F.T.C.* v. *Texaco, Inc.*, 381 U.S. 739, 740.

In *Atlantic,* the Supreme Court upheld (1) the Commission's decision that a sales commission agreement between Atlantic Refining Company and Goodyear Tire & Rubber Company was an unfair method of competition, and (2) the Commission's order prohibiting Atlantic and Goodyear from carrying out their agreement and from performing or entering into any other sales commission agreements. The Commission, without the participation of Chairman Dixon and Commissioner MacIntyre, has reviewed afresh the entire record in this proceeding, in the light of the Supreme Court's decision in *Atlantic.* We have concluded, for the reasons set forth below, that the sales commission agreement involved here is, in its fundamental operation and effect, indistinguishable from the one held unlawful in *Atlantic,* and that an order like the one affirmed by the Supreme Court in *Atlantic* should be entered here.

I.

An assessment of the relationship between this case and *Atlantic* requires a brief description of the events leading to this remand. This is one of three companion cases in which the Commission challenged, as an un-

fair method of competition, sales commission arrangements between major rubber companies and major oil companies. In *Goodyear Tire & Rubber Co.*, 58 F.T.C. 309, decided March 9, 1961, the Commission entered an order prohibiting Goodyear and Atlantic from employing sales commission plans. On the same day, in *Firestone Tire & Rubber Co.*, 588 F.T.C. 371, an identical order was entered against Firestone and Shell Oil Company. The Commission's order in *Goodyear* has been affirmed by the Supreme Court. *Atlantic Refining Co.* v. *F.T.C.*, 381 U.S. 357, affirming 331 F. 2d 394 (7th Cir. 1964). An appeal from the Commission's order in *Firestone* is pending in the Court of Appeals for the Fifth Circuit.

In both *Goodyear* and *Firestone* the Commission's reasoning was identical: It upheld the hearing examiner's finding that the oil companies used overt coercive tactics to force their dealers to buy the sponsored rubber companies' TBA products. But the Commission specifically declined to rest its decisions upon a finding of coercion or to limit its orders to injunctions against coercive tactics. Instead, it examined the unique degree to which the economic existence of gasoline dealers is dependent upon the good will of their major oil company suppliers, and concluded that the oil company "has sufficient economic power with respect to its * * * distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics * * *." (58 F.T.C. at 364–65, 407.) The Commission regarded "overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission itself" (58 F.T.C. at 348, 398). Analyzing the actual operation of the sales commission plan in the context of the economic relationship between the oil company and its dealers, the Commission con-

concluded that the competitive effects of the sales commission plan were like those of an illegal tying arrangement—it "presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." (58 F.T.C. at 367; see 58 F.T.C. at 406). Since the amount of commerce affected was "not insubstantial", the agreements were held unlawful.

However, in this proceeding involving the Goodrich-Texaco sales commission plan, the Commission did not reach the same result. On the same day that it issued its orders in *Goodyear* and *Firestone,* the Commission held that although "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics", the record did not contain "sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA". The case was remanded to the hearing examiner for the taking of additional evidence on that issue. *B. F. Goodrich Co.,* 58 F.T.C. 1176, 1178–79, 1183.

This disposition was, at the very least, enigmatic: In *Goodyear,* the Commission found that the competitive effect of the sales commission plan, like a tying arrangement, was the foreclosure of the substantial TBA marketing outlets represented by Atlantic's dealers. This finding was based upon competing wholesalers' testimony that they were unable to sell to Atlantic dealers who feared that Atlantic would look with disfavor upon their purchase of any but Atlantic-sponsored TBA products. Having made this finding, the Commission made no analysis of "market data" other than to observe that the amount of com-

merce affected was "not insubstantial" since Atlantic had sold about $50 million in sponsored TBA products during the period 1950–1956. (58 F.T.C. at 359–66.) In *Goodrich* the Commission did not reject the hearing examiner's acceptance of the testimony of competing wholesalers regarding foreclosure of Texaco outlets, which was similar to, and as substantial as, that in *Goodyear*. The amount of commerce affected in *Goodrich* was considerably more substantial than that in *Goodyear*: in the five-year period 1952–1956 Texaco sold more than $245 million in sponsored TBA, almost five times as much as was involved in *Goodyear* during a six-year period. What additional "market data" was required is unclear.[8]

On remand, after taking further evidence, the hearing examiner found that the sales commission plans had been shown to be an unfair method of competition, and entered an order identical to those previously entered in *Goodyear* and *Firestone*. An appeal was again taken to the Commission. By that time, the composition of the Commission had changed and only one of the Commissioners (Commissioner Anderson) who had participated in the Commission's earlier decision remained on the Commission. On this second appeal to the Commission, much of the evidence introduced on the remand was challenged as incompetent or immaterial. The Commission concluded that the challenged evidence was unnecessary to its decision, and, with Commissioner Anderson dissenting, upheld

[8] In *Firestone* the Commission did consider market share data relating to the entire market for TBA, including data relating to other outlets for TBA other than service stations, and other methods of distributing TBA other than sales commission plans. But none of this information was present in *Goodyear*, and so presumably this was not the kind of "market data" deemed critical by the Commission to a finding of illegality.

the examiner's order.[3] In its view, the legal principles under which the sales commission plans were held unlawful in *Goodyear* and *Firestone* were equally applicable to the *Goodrich* record, even without the challenged evidence (*B. F. Goodrich Co.*, Docket 6485, order issued April 15, 1963).

On appeal, the Court of Appeals for the District of Columbia Circuit reversed and ordered that the complaint be dismissed.[4] After holding that Chairman Dixon was barred from participating in the decision of the case, the Court of Appeals went on to reject the Commission's decision on the merits. It rejected the examiner's finding that Texaco employed coercive tactics and then held that "the Commission erred in concluding that Texaco has sufficient economic power over its dealers, without the use of coercive tactics, to cause them to buy substantial quantities of Goodrich TBA." (336 F. 2d at 762.) Instead, it found that Texaco dealers "are quite free to accept or reject" the oil company's "recommendation" to purchase sponsored TBA products (*id.* at 763).

The fundamental premise underlying this conclusion was the Court of Appeals' finding that there was "no basis in this record for the Commission's conclusion that Texaco has controlling economic power over its dealers" and that Texaco's "contracts with [its] dealers do not give rise" to an inference that it did. (*Id.* at 762.) In the court's view, the "promotional services" performed by Texaco were indistinguishable from, and no less lawful than, conventional salesmanship to wholly independent purchasers.

[3] We agree that the evidence challenged on the second appeal to the Commission is unnecessary to our decision and have stricken the Findings and Conclusions of the hearing examiner based upon it.

[4] *Texaco, Inc.* v. *F.T.C.*, 336 F. 2d 754 (D.C. Cir. 1964).

This approach conflicted with that of the Court of Appeals for the Seventh Circuit, which affirmed the Commission's order in *Goodyear*.[5] For the Seventh Circuit the starting point for any realistic assessment of the nature and competitive effect of an oil company's "recommendations" under the sales commission plan was the economic power which the oil company possessed over its dealers and which derived from the contractual relationship between them. In its view, the "heart of this case is the economic power Atlantic possesses over its service station dealers" (331 F. 2d at 400). Such power was not at all dependent upon coercive tactics.[6] Rather, the "keystone" to that power could be found in the "lease and equipment loan con-

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[5] *Goodyear Tire & Rubber Co.* v. *F.T.C.*, 331 F. 2d 394 (7th Cir. 1964).

[6] The Seventh Circuit upheld the Commission's finding of coercion; the District of Columbia Circuit rejected it. The evidence of coercion in *Texaco* was no less substantial than that in *Atlantic-Goodyear*. The different results on appeal appear attributable to two factors: (1) the Seventh Circuit deferred to the hearing examiner's assessment of the witnesses' credibility, and (2) while only a few dealer witnesses testified to coercive tactics and a considerably larger number of dealers called by respondents testified to the contrary, the Seventh Circuit thought the hearing examiner correctly evaluated the entire testimony in light of the economic dependency of dealers upon the oil company. Review in the Supreme Court of the finding of coercion was not sought in *Atlantic*. To the extent respondents seek to distinguish this case from *Atlantic* on the presence or absence of coercion, we conclude that no such factual distinction exists; we do not disturb the examiner's finding of coercion which was based essentially on his assessment of the credibility of the witnesses. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 495–96. However, as we point out below, the fundamental issue here—the legality of sales commission agreements between major oil and major rubber companies—does not turn on a finding of coercion, and we do not rest our decision upon it.

tract with their short term and cancellation provisions." (*Ibid.*) Viewed in the context of these provisions, the "service station dealer is more of an economic serf than a businessman free to purchase the TBA of his choice." (*Ibid.*) Reaching an opposite conclusion from that of the District of Columbia Circuit in *Texaco*, the Seventh Circuit held (*id.* at 401):

> "Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA.
>
> "Atlantic says that its influence over its dealers to purchase sponsored TBA short of force, threat, or intimidation is lawful; that it may recommend high quality TBA to its dealers; and that such action serves a legitimate business purpose in the promotion of the sale of gasoline. This would be a persuasive argument except for the dealers' economic dependency upon the oil company. In that setting, recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats."

Supreme Court review was sought in both *Texaco* and *Atlantic-Goodyear*. The Commission, arguing that different dispositions of the two cases based upon narrow factual distinctions would be inappropriate, framed the issue presented by both cases in identical, broad terms, asking the Court to hold that:

> "[I]t is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a major rubber company

> and a major oil company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the rubber company's products to the oil company's retail dealers."'[7]

In both cases the Commission urged the same broad rationale reflected by the Commission and Seventh Circuit decisions in *Goodyear:* (1) Because of the gasoline dealer's singular dependence upon, and subservience to, his major oil company supplier, the oil company had the power to require its dealers to purchase substantial quantities of TBA without overt coercion; (2) the promotional services which the oil company was obligated to, and did, perform under the sales commission agreement constituted the exercise of that power for the benefit of the sponsored TBA supplier; and (3) as a result, the effect of the sales commission plan is like that of a tying agreement, foreclosing competing non-sponsoring suppliers from the substantial market of the sponsoring oil company's dealers.[8]

The Supreme Court reviewed the *Atlantic-Goodyear* case for the purpose of resolving the "apparent conflict" with *Texaco* (381 U.S. at 363). The Court affirmed the Seventh Circuit's decision, and a week later vacated the judgment of the District of Columbia Circuit in *Texaco* and ordered that the case be remanded to the Commission for reconsideration in light of the decision in *Atlantic* (*F.T.C.* v. *Texaco, Inc.*, 381 U.S. 739).

[7] *F.T.C.* v. *Texaco, Inc., supra*, Petition for a Writ of Certiorari to the United Supreme Court of Appeals for the District of Columbia Circuit, p. 2; *Atlantic Refining Co.* v. *F.T.C., supra*, Brief for the Federal Trade Commission, p. 2.

[8] *Atlantic Refining Co.* v. *F.T.C., supra*, Brief for Federal Trade Commission, pp. 32–34; *F.T.C.* v. *Texaco, Inc., supra*, Petition for a Writ of Certiorari, pp. 16–19.

II.

We turn then to the threshold question in this remand proceeding: What light is cast by the Supreme Court's decision in *Atlantic* upon the appropriate disposition of this case?

Reading its opinion against the background set forth above, we can draw only one conclusion: In upholding the Seventh Circuit and Commission decisions, the Supreme Court approved their broad rationale, rejected the approach taken by the District of Columbia Circuit in this case, and enunciated a rule which transcends the confines of the particular facts involved in *Atlantic.* In the Court's view, while coercive practices aggravate the restraint imposed by the sales commission plan, it is the oil company's power over its dealers, derived from the contractual relationship between them, and the utilization of that power through the performance of the promotional services required by the sales commission agreement, which renders the sales commission plan unlawful.

The starting point for the Supreme Court's analysis, like the Seventh Circuit's, is reflected in its emphasis upon the oil company's considerable economic power over its dealers. The Court said (381 U.S. at 368):

> "[Atlantic and its dealers] simply do not bargain as equals. Among the sources of leverage in Atlantic's hands are its lease and equipment loan contracts with their cancellation and short-term provisions. Only last term we described the power implications of such arrangements in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), and we need not repeat that discussion here. It must also be remembered that Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers. This was an additional source of economic leverage, *United States* v. *Loew's, Inc.*, 371 U.S. 38, 45 (1962) * * *"

In this context, "threats and coercive practices" merely "bolstered" the "lever" which resulted from this economic power (*id.* at 369). The Court viewed the oil company's aggressive and vigorous salesmanship in carrying out the sales commission plan, wholly apart from any coercive tactics, as an exertion of "the persuasion that is a natural incident of its economic power" (*id.* at 368), rather than as the "recommendations" of a salesman to an independent purchaser "free to accept or reject" them.

Accordingly, the Court accepted the Commission's and the Seventh Circuit's characterization that the sales commission contract, which obligated the oil company to use its power over its dealers to sell the sponsored rubber companies' TBA, had the same "central competitive characteristic" as a tying agreement—"the utilization of economic power in one market to curtail competition in another". (*Id.* at 369.) Indeed, in the Court's view, that was its primary if not sole purpose. Under the sales commission plan (as the records in both *Atlantic* and *Texaco* show), the oil company, without making any investment in distributional facilities or TBA inventory, and without relieving the TBA supplier of the burden of sales, distribution, and service, is nevertheless paid large commissions for its promotional efforts. Accordingly, the Court found that "it is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers * * *" (*id.* at 376).

In sum, the Supreme Court, in upholding the Commission's order prohibiting outright the use of the sales commission plan by Atlantic and Goodyear, was also affirming the rationale of the Commission's de-

cision, which the Court described as follows (*id.* at 361):

> "[T]he Commission considered the coercive practices to be symptomatic of a more fundamental restraint of trade and found *the sales-commission plan illegal in itself* as 'a classic example of the use of economic power in one market * * * to destroy competition in another market * * *.'" [Emphasis supplied.]

At the same time the Supreme Court dispelled the ambiguities generated by the Commission's first decision in this proceeding. An assessment of the competitive effects of the sales commission plan does not require an analysis of "market data". Since the testimony only confirmed what was essentially implicit in the relationship between the oil company and its dealers—that the oil company's sponsorship under the sales commission plan has the competitive effect of foreclosing non-sponsored TBA suppliers from access to the market represented by the oil company's dealers—further market analysis is unnecessary. It is sufficient to show that a "not insubstantial portion of commerce is affected".*

* The Court said in this regard (*id.* at 371):

> "Goodyear and Atlantic contend that the Commission should have made a far more extensive economic analysis of the competitive effect of the sales-commission plan, examining the entire market in tires, batteries and accessories. But just as the effect of this plan is similar to that of a tie-in, so it is unnecessary to embark upon a full-scale economic analysis of competitive effect. We think it enough that the Commission found that a not insubstantial portion of commerce is affected."

Atlantic had indeed based its contention that a more extensive economic analysis was necessary, in part, upon the Commission's first decision to remand *Goodrich-Texaco* to take evidence of "market data" for an assessment of the competitive effects of the sales commission plan. *Atlantic Refining Co.* v. *F.T.C., supra,* Brief of Petitioner The Atlantic Refining Company, pp. 31–32, 57, n. 43.

To be sure, the Supreme Court took note of the striking demonstration in *Atlantic* of both the extreme abuses attending Atlantic's use of the sales commission plan, and the dramatic effectiveness of the plan in foreclosing non-sponsored TBA suppliers from the Atlantic service station market. *Atlantic* was the first case before the Court involving a challenge to the sales commission plan; it presented for review a Commission decision whose rationale would render unlawful the sales commission plans themselves, whenever used by major oil and rubber companies. The Court, therefore, made a careful examination of the entire record to assess the "economic and business stuff out of which these arrangements emerge", so as to determine whether they are "naked restraints of trade with no purpose except stifling of competition" and whether "they may be too dangerous to sanction" (*White Motor Co.* v. *United States*, 372 U.S. 253, 263). But, like the Commission, the Court looked upon the dramatic aspects of *Atlantic* as "symptomatic" of a broader problem. Having examined, as reflected by the record in *Atlantic*, the dangers presented by sales commission plans, their essentially anticompetitive character, and the vivid demonstration of the abuses which may attend their use, the Court concluded more generally that the sales commission plan itself "amount[s] to a device that permits suppliers of tires, batteries and accessories, through the use of oil company power, to effectively sew up large markets" and, as such, could not be defended even though it might be an efficient and economic method of distribution (381 U.S. at 371). Consequently, the Court's ultimate concern was not limited to the sales commission plan involved in *Atlantic*, but was rather with "the destructive effect on commerce that would result from the widespread

use of these [sales commission] contracts by major oil companies and [TBA] suppliers" (*ibid.*).

The Court's concern in *Atlantic* with the dangers presented by the "widespread use" of the sales commission plans by major oil and TBA suppliers is especially significant. *Atlantic* was not, as the Court was well aware, an isolated case. In *Texaco,* in which a petition for certiorari was pending at the time of the Court's decision in *Atlantic,* the record showed that Texaco entered into sales commission plans with three of the leading rubber companies—Goodrich, Firestone and, under an agreement instituted about the time this proceeding began, U.S. Rubber Company. Goodrich also had sales commission plans with Continental Oil Company and other oil companies as well. The *Firestone* and *Goodyear-Atlantic* cases show that both Goodyear and Firestone have sales commission plans with Shell and Atlantic; that in addition, Goodyear has sales commission plans with Sinclair Refining Company, Richfield Oil Company, and a number of other oil companies; and that Firestone, in addition to its sales commission plan with Texaco, has sales commission arrangements with Union Oil Company, Continental Oil Company, and others.

The service station dealer outlets affected by these sales commission plans constitute a vast market for the sale of TBA; and at the same time only the largest rubber companies are the beneficiaries of the marketing advantages derived from the sales commission plans, a fact which would appear to confirm the Commission's finding in *Atlantic* that smaller TBA suppliers are unable to utilize the sales commission arrangement (58 F.T.C. at 367). Given the Court's view of the fundamentally anticompetitive character of the sales commission plan when used by oil companies possessing power over their dealers, the proliferation

of these plans between major oil companies and major rubber companies constitutes in itself an acute danger for competition. It was in this context that the Court, looking beyond *Atlantic*, and the specific facts involved there, concluded that generally the use of the sales commission plan by major oil companies and major rubber companies, whatever its economic advantages, is a practice "too dangerous to sanction".

This conclusion is buttressed as much by what the Court did, as by what it said. The Court's affirmance of the Commission's order prohibiting outright the use of sales commission plans by Atlantic and Goodyear not only between themselves but with other companies had broad competitive consequences in both the TBA and petroleum markets. If the Court's decision were to be read as limiting the Commission in its evaluation of other sales commission plans to the specific factual circumstances involved in *Atlantic*, one major oil and one major rubber company would be prohibited not only from further engaging in coercive tactics, but from using a sales commission plan which its major competitors might still be free to use.

For example, at the present time, it would appear that three of the largest rubber companies, Goodrich, Firestone, and U.S. Rubber, use sales commission plans providing Texaco sponsorship to promote their TBA products to Texaco's dealers. Yet, Goodyear could not ask Texaco (even assuming that Texaco has demonstrated no propensity to use coercive tactics in performing its other sales commission plans) to perform for it the same promotional service which Texaco performs for Goodyear's three major competitors. At the same time, Texaco, one of the largest oil companies, without making any investment in distributional facilities or TBA inventory, receives sub-

stantial commissions for the sale of TBA products to its service stations. Atlantic, a major oil company but substantially smaller than Texaco, is barred from the same economic opportunity, no matter how scrupulously it might refrain from coercive tactics in the future. Yet, the same kinds of leases, equipment loan contracts, and sales agreements stressed by the Court in *Atlantic* also render Texaco dealers economically subservient to, and dependent upon, Texaco; and its sales commission plans require Texaco to perform the same kind of vigorous promotional campaign described in *Atlantic*. To bar only Atlantic and Goodyear from the use of the sales commission plan would thus not only create a harmful competitive imbalance among the leading firms of the two industries, it would be arbitrary and inequitable.

The Supreme Court was informed of the harmful and anomalous consequence of a rule confined to the particular facts of *Atlantic*.[10] We find nothing which would permit us to read the Court's opinion, or its

[10] The Government in its petition for certiorari in *Texaco* told the Court:

> "Even if the cases [Atlantic and Texaco] could be distinguished on their facts, the conflict, if unresolved, would create an anomalous situation in which one major oil company and a large tire company were permitted to employ essentially the same marketing practice that their competitors were prohibited from using."

F.T.C. v *Texaco, Inc.*, 381 U.S. 739, Petition for a Writ of Certiorari, p. 12.

Similarly, Atlantic told the Supreme Court that:

> "The order in each of the two cases represents a rule of general application, not the disposition of an isolated controversy. The rule should be uniform throughout the industry. Moreover, Atlantic and Texaco are competitors; and Atlantic, the smaller company, should not be under a marketing handicap as against Texaco, which is three times larger."

Atlantic Refining Company v. *F.T.C.*, *supra*, Brief of Petitioner The Atlantic Refining Company, p. 34.

remand order in this proceeding, as sanctioning such results.

III.

In our view the Supreme Court's decision in *Atlantic* compels the conclusion that the Texaco-Goodrich plan is an unfair method of competition and that Texaco and Goodrich should be prohibited, as were Atlantic and Goodyear, from performing or entering into any other sales commission plans. The Court's concern for the dangers which derived from a widespread use of the sales commission plan is especially relevant here. As has been pointed out, Texaco is considerably larger than Atlantic. Its service station dealers constitute an even more significant TBA market. Stations operated by Texaco's lessee dealers[11] and contract dealers[12] constituted 16.5% of the service stations in the United States in the year 1955. In that year, Texaco had approximately six times as many contract and lessee dealers as Atlantic.[13]

Moreover, as we have noted, in *Atlantic* the total sales to Atlantic dealers of Goodyear and Firestone products for the six-year period June 1950–June 1956 amounted to about $50 million. Goodrich and Firestone sold almost $60 million in TBA products to Texaco

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[11] A lessee station (referred to as a C station) is one that is either owned or leased by Texaco and in turn leased by it to the dealer.

[12] A contract station (referred to as D stations) is either owned by the operator or leased by him from someone other than Texaco. In addition to selling gasoline directly through C and D stations, Texaco sells indirectly through consignees (B accounts) and independent distributors (E accounts), who operate bulk storage plants, purchase Texaco products and sell them to service station dealers and consumers.

[13] In 1955 Texaco had approximately 30,000 contract and lessee dealer stations; Atlantic had approximately 5,000 service stations. 381 U.S. at 368.

dealers in the year 1956 alone. In the five-year period 1952–1956, the sales of the sponsored Goodrich and Firestone TBA to Texaco amounted to approximately $245 million.

The economic dependence of Texaco dealers is no different from that of Atlantic dealers. Thus, Texaco lessee dealers, who constitute the most important segment of service station TBA outlets, have the same kind of short term leases, renewable on a year-to-year basis and terminable at year's end upon ten days' notice of either party. These leases contain the same kind of general "housekeeping" requirements concerning the station's use, maintenance and appearance which, if breached, can result in immediate cancellation by Texaco without notice to the lessee. The lessees have often made a considerable investment in their stations, at times, on funds borrowed from Texaco. "Contract dealers", who own their stations or lease them from third parties, nevertheless lease their pumps and other equipment from Texaco. Both lessee and contract dealers purchase their gasoline pursuant to an "Agreement of Sale", prescribing annual minimum and maximum purchases at current Texaco prices. These "Agreements of Sale" also are generally on a year-to-year basis, terminable at year's end upon thirty days' notice, and automatically cancelled if a lessee dealer's lease is terminated.

In these circumstances, the competitive advantage given a TBA supplier whose products are sponsored by Texaco need hardly depend upon the use of overtly coercive tactics. Here, as in *Atlantic*, Texaco's "promotional" efforts in carrying out its sales commission agreement with Goodrich and Firestone constitute a forceful exercise of its economic power over its dealers. Its consequence is to impress upon Texaco dealers, through constant repetition and in a variety

of ways, that Texaco, whose favor the dealer must court, has a strong interest in their purchase of the sponsored TBA products.

Even before the dealer has been accepted, Texaco begins its campaign on behalf of the sponsored TBA products. Texaco personnel, when interviewing prospective dealers for new or established service stations, advised them of the importance of TBA, recommending the TBA products of Goodrich and Firestone. Once the dealer is selected, and before he opens his station, Texaco frequently informs Goodrich and Firestone of the prospective opening of his station, affording Goodrich and Firestone a head start over competitors in the initiation of their own sales campaign on behalf of their products. Thereafter, Texaco, often with the direct assistance and participation of the rubber companies, maintains a continuous campaign designed to induce the dealer to purchase the sponsored TBA products. Dealer meetings and training courses designed to educate the dealer in the use of TBA products utilize the products of the sponsored companies. Texaco participates in the sponsored companies' seasonal and special sales, promotional and advertising campaigns. Texaco publications sent to its dealers carry displays of the sponsored TBA products. And, perhaps most effective of all, the Texaco salesman continually carries the message in his day-to-day contacts with the dealers. In this regard, it is important to remember that these Texaco salemen, who are most directly involved in pushing the sponsored TBA products, also play a critical role in the annual dealer evaluations and in the determination of whether the dealer's lease and contractual relations with Texaco are to be renewed. At the same time, Texaco, in making promotions, evaluates these salesmen's perform-

ances in part by their success in selling sponsored TBA products.

Frequently, both the Texaco and rubber company salesmen call upon the dealer together ("double teaming"). The Supreme Court in *Atlantic* noted the inherently coercive effect of that device, pointing out that since "the annual dealer evaluation by Atlantic salesmen carried substantial weight when the district managers decided upon annual lease extensions * * * dealers were * * * understandably susceptible to the encouragement of Goodyear salesmen when Atlantic men were nearby looking over their shoulders." (381 U.S. at 375.) And, as in *Atlantic*, each dealer's performance as a purchaser of sponsored TBA is also fully disclosed by the reports furnished by the sponsored rubber companies to Texaco of the amount of sponsored TBA purchased by each dealer. As the record indicates, Texaco, in assessing the economic success of service stations, was vitally concerned with the amount of sponsored TBA sold by its dealers.

Here, as in *Atlantic*, there was substantial testimony by non-sponsored TBA suppliers confirming the conclusion that, as a result of Texaco's vigorous sales campaign to its dealers, many Texaco dealers were left with the impression that Texaco would look with disfavor upon their purchase of non-sponsored TBA products and that they were required to purchase the sponsored TBA. As a result, these non-sponsored suppliers were unable to gain access to these Texaco service station outlets. In sum, the Supreme Court's characterization of the operation of the sales commission plan in *Atlantic* is equally applicable here. Texaco, with Goodrich's "encouragement and assistance, has marshalled its full economic power in a continuing campaign to force its dealers and wholesalers to buy [Goodrich] products" (*id.* at 371).

Respondents argue that there are a number of factual distinctions between this case and *Atlantic*. But as we read *Atlantic* none of these distinctions is material. As already demonstrated, under *Atlantic* it is the oil company's power over its dealers, and the exercise of that power through the performance of the promotional services required by the sales commission agreement, and not coercive tactics, which condemns the sales commission plan. And while, unlike *Atlantic*, the sales commission plans involved here did not allocate territories between the sponsored TBA suppliers, the gravest danger to competition presented by the sales commission plans here as in *Atlantic* is in their capacity for hindering competition between sponsored and non-sponsored TBA suppliers. A device which may enhance the position of two or three leading TBA suppliers vis-a-vis smaller competitors cannot be defended on the ground that it still leaves these few firms free to "compete" with one another for access to the Texaco service station market.

Respondents also argue that, unlike *Atlantic*, there is here no showing that Texaco's promotional campaign was effective. Thus, they contend that the statistics show that only about 30% of Texaco's dealers purchased sponsored TBA products. This figure, however, is derived by considering the number of Texaco dealers purchasing sponsored TBA in proportion to the total number of lessee and contract dealers. In fact, however, as respondent Goodrich, itself, points out,[14] many contract dealers do not handle, and are not appropriate outlets for, TBA products. Since more than half of the total number of Texaco dealers are made up of contract dealers, the actual success of

[14] Brief of Respondent The B. F. Goodrich Company, In Answer to Appeal Brief of Counsel Supporting the Complaint, dated March 28, 1960, p. 28.

Texaco's sales commission plans would appear to be considerable indeed. But, under *Atlantic,* proof of the actual effectiveness of the sales commission plan is unnecessary. The Court's ultimate concern was with the cumulative danger presented by the "widespread use" of the plans, rather than the relative effectiveness of particular plans. Moreover, the Court viewed the sales commission plan when used by a major oil company as having the same competitive characteristics as a tying agreement. As in the case of a tying agreement, the fact that the sales commission plan has not fully achieved its purpose, or that nonsponsored suppliers can overcome the unfair competitive advantage which the sales commission gives the sponsored supplier, is no defense. Cf. *International Salt Co.* v. *United States,* 332 U.S. 392, 397; *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 12; *Osborn* v. *Sinclair Refining Co.,* 286 F. 2d 832, 838 (4th Cir. 1960), cert. denied 366 U.S. 963.

In essence, respondents urge upon us the rationale of the District of Columbia Circuit's opinion—that despite the economic dependence of the Texaco dealer upon Texaco, Texaco's vigorous promotional activities under the sales commission plan are nothing more than the "recommendations" of a salesman to a purchaser "free to accept or reject" them. In affirming the Seventh Circuit's decision in *Atlantic,* the Supreme Court rejected that position.

IV.

We think that orders against both Texaco and Goodrich, identical with the orders against Atlantic and Goodyear which were affirmed by the Supreme Court, are appropriate here. Texaco should clearly be enjoined from entering into or performing any sales commission plan. As to Goodrich, like Goodyear, it

was "no silent or inactive partner in the implementation of the sales-commission plan" (381 U.S. at 373). As the record demonstrates, the sales commission plan here is essentially a joint effort in which the massive power of a major rubber company and a major oil company is united, to the disadvantage of non-sponsored competitors, behind the sale of the rubber company's TBA products. Goodrich now has sales commission plans with five other oil companies: Continental, Shell-American, Jenney, Ohio Oil and Emblem. Its sales commission plans with these companies are substantially the same as those it has with Texaco. There is nothing in this record to indicate that these oil companies do not also have the kind of economic power possessed by Texaco over its dealers. We would not be justified in concluding that any of these other plans, unlike Goodrich's plan with Texaco, was not an attempt to buy the economic power of the oil company over its dealers in order to obtain an unfair competitive advantage over competing rubber companies. The order therefore prohibits Goodrich from entering into or carrying out any sales commission plan. If Goodrich should come forward with facts establishing that it has a sales commission plan with any oil company which does not possess economic power over its dealers, the proceeding can always be reopened for such modification of the order as may be warranted. See *Atlantic Refining Co.* v. *F.T.C., supra,* at 377.

Chairman Dixon and Commissioner MacIntyre did not participate in this decision.

JANUARY 14, 1966.

APPENDIX C

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

Docket No. 6485

In the Matter of The B. F. Goodrich Company, and The Texas Company, corporations.

FINAL ORDER

By its order dated June 16, 1965, the Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings in conformity with the opinion of the Supreme Court herein dated June 7, 1965. Pursuant thereto, the Commission heard oral argument and received written briefs, and fully considered, on the basis of the entire record, all questions of fact and law presented by the appeals from the hearing examiner's revised initial decision of September 24, 1962. For the reasons stated in the accompanying opinion of the Commission,

IT IS ORDERED that:

A.

The revised initial decision of the hearing examiner be, and it hereby is, modified as follows:

(1) Findings 10(b), 32, 33, 34, and conclusion 7 are stricken.

(2) The first sentence of finding 8 is deleted, and the following is substituted therefor: "Tires, batteries, and accessories have become a necessary and integral part of the business operation of the ordinary Texaco dealer, and in particular for Texaco's lessee dealers."

(3) The last sentence of finding 20 is deleted and the following is substituted therefor: "It would be unusual to expect that a Texaco salesman would vigorously insist to a dealer that he had a right to buy wherever he might wish when Texaco's evaluation of the salesman's performance was in part based upon his success in selling sponsored TBA products to the dealer."

(4) The second sentence in finding 26 is deleted, and the following is substituted therefor: "There are written contracts with Texaco, Conoco, and Ohio-Marathon, but there are no formal contracts with the other three oil companies, which are smaller local concerns. Shell-American and Jenney operate generally with only service station customers selling at the retail level, but without wholesale outlets such as consignees, jobbers, and distributors."

(5) The second sentence in finding 30 is deleted, and the following is substituted therefor: "From 1952 to the end of 1955, the number of Conoco leased stations increased from 1,138 to 1,765."

(6) The last sentence of finding 31, and the chart immediately below, are deleted, and the following substituted therefor: "Outlets of the additional oil companies having sales commission contracts with Goodrich during the years 1953–55 were as follows:

	12-31-53	12-31-54	12-31-55
Conoco	1061	1272	1508
Shell-American	53	66	60
Jenney Mfg.	138	188	201
Ohio Oil	594	666	804
Emblem	30	9	25
	1876	2201	2598."

(7) The first sentence of conclusion 5 is deleted, and the following is substituted therefor: "Practically all of the representatives of the competitors of Goodrich called as witnesses testified generally that they had difficulty in selling TBA to Texaco stations and testified specifically as to the reasons given by certain Texaco dealers for not buying or selling their TBA items."

B.

The hearing examiner's revised initial decision of September 24, 1962, as hereinabove modified and supplemented by the accompanying opinion, and the order contained in said revised initial decision be, and they hereby are, adopted as the decision and order of the Commission.

C.

The respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form of their compliance with this order.

By the Commission, Chairman Dixon and Commissioner MacIntyre not participating.

[SEAL] JOSEPH W. SHEA,
Secretary.

Issued: January 14, 1966.

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1967.

No. 20,058

TEXACO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 20,061

THE B. F. GOODRICH COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

(United States Court of Appeals for the District of Columbia Circuit; filed September 25, 1967; Nathan J. Paulson, clerk).

On Petitions to Review an Order of the Federal Trade Commission.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Burger, Circuit Judge.

JUDGMENT

These cases came on to be heard on the record from the Federal Trade Commission, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Federal Trade Commission on review in these cases is set aside, and these cases are hereby remanded to the Federal Trade Commission with directions to dismiss the complaint.

Per Circuit Judge BURGER.

Dated: September 25, 1967.
A true copy.
Test:

NATHAN J. PAULSON,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

U.S. GOVERNMENT PRINTING OFFICE: 1968

OPINION

SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1968.

Federal Trade Commission, Petitioner, v. Texaco, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December 16, 1968.]

Mr. Justice Black delivered the opinion of the Court.

The question presented by this case is whether the FTC was warranted in finding that it was an unfair method of competition in violation of § 5 of the Federal Trade Commission Act for respondent Texaco to undertake to induce its service station dealers to purchase Goodrich tires, batteries, and accessories (hereafter referred to as TBA) in return for a commission paid by Goodrich to Texaco. In three related proceedings instituted in 1961, the Commission challenged the sales commission method of distributing TBA and in each case named as a respondent a major oil company and a major tire manufacturer. After extensive hearings, the Commission concluded that each of the arrangements constituted an unfair method of competition and ordered each tire company and each oil company to refrain from entering into any such commission arrangements. In one of these cases, *Atlantic Refining Company* v. *Federal Trade Commission*, 381 U. S. 357 (1964), this Court affirmed the decision of the Court of Appeals for the Seventh Circuit sustaining the Commission's order against Atlantic Refining Company and the Goodyear Tire and Rubber Company. In a second case, *Shell Oil Company* v. *Federal Trade Commission*, 360 F. 2d 470, cert. denied, 385 U. S. 1002, the Court of Appeals for the Fifth Circuit, following this Court's decision in

Atlantic, sustained the Commission's order against the Shell Oil Company and the Firestone Tire and Rubber Company. In contrast to the decisions of these two Courts of Appeal, the Court of Appeals for the District of Columbia set aside the Commission's order in this, the third of the three cases, involving respondents Goodrich and Texaco. 336 F. 2d 754 (1964).[1] The Commission petitioned this Court for review and, one week following our *Atlantic* decision, we granted certiorari and remanded for further consideration in light of that opinion. 381 U. S. 739 (1965). The Commission, on remand, reaffirmed its conclusion that the Texaco-Goodrich arrangement, like that involved in the other two cases, violated § 5 of the Federal Trade Commission Act. The Court of Appeals for the District of Columbia again reversed, this time holding that the Commission had failed to establish that Texaco had exercised its dominant economic power over its dealers or that the Texaco-Goodrich arrangement had an adverse effect on competion. 383 F. 2d 942. We granted certiorari to determine whether the court below had correctly applied the principles of our *Atlantic* decision.

Congress enacted § 5 of the Federal Trade Commission Act to combat in their incipiency trade practices that exhibit a strong potential for stifling competition. In large measure the task of defining "unfair methods of competition" was left to the Commission. The legislative history shows that Congress concluded that the best check on unfair competition would be "an administrative

[1] The sales commission arrangement between Texaco and the Firestone Tire and Rubber Company was also the subject of Commission action. Firestone is not a respondent in this action, however, since it is already subject to a final order of the Commission prohibiting its use of a sales commission plan with any oil company. See *Shell Oil Company* v. *Federal Trade Commission*, 360 F. 2d 470, 474 (C. A. 5th Cir.), cert. denied, 385 U. S. 1002.

body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations." H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19. *Atlantic Refining Co.* v. *FTC*, 351 U. S. 357, 367. While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight. *FTC* v. *Motion Picture Advertising Serv. Co.*, — U. S. 392, 396 (1953); *FTC* v. *Cement Institute*, 333 U. S. 683, 720 (1948). This is especially true here, where the Commission has had occasion in three related proceedings to study and assess the effects on competition of the sales commission arrangement for marketing TBA. With this in mind, we turn to the facts of this case.

The Commission and the respondents agree that the Texaco-Goodrich arrangement for marketing TBA will fall under the rational of our *Atlantic* decision if the Commission was correct in its three ultimate conclusions that (1) Texaco has dominant economic power over its dealers; (2) that Texaco exercises that power over its dealers in fulfilling its agreement to promote and sponsor Goodrich products; and (3) that anticompetitive effects result from the exercise of that power.

That Texaco holds dominant economic power over its dealers is clearly shown by the record in this case. In fact, Texaco does not contest the conclusion of the Court of Appeals below and the Fifth Circuit Court of Appeals in *Shell* that such power is "inherent in the structure and economics of the petroleum distribution system." 383 F. 2d 942, 946 (C. A. D. C. Cir.); 360 F. 2d 470, 481 (C. A. 5th Cir.). Nearly 40% of the Texaco dealers lease their stations from Texaco. These dealers typically

hold a one-year lease on their stations, and these leases are subject to termination at the end of any year on 10 days notice. At any time during the year a man's lease on his service station may be immediately terminated by Texaco without advance notice if in Texaco's judgment any of the "house-keeping" provisions of the lease, relating to the use and appearance of the station, are not fulfilled. The contract under which Texaco dealers receive their vital supply of gasoline and other petroleum products also runs from year to year and is terminable on 30 days notice under Texaco's standard form contract. The average dealer is a man of limited means who has what is for him a sizable investment in his station. He stands to lose much if he incurs the ill will of Texaco. As Judge Wisdom wrote in *Shell*, "A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord." 360 F. 2d 470, 487.

It is against the background of this dominant economic power over the dealers that the sales commission arrangement must be viewed. The Texaco-Goodrich agreement provides that Goodrich will pay Texaco a commission of 10% on all purchases by Texaco service station dealers of Goodrich TBA. In return, Texaco agrees to "promote the sale of Goodrich products" to Texaco dealers. During the five-year period studied by the Commission (1952–1956) $245,000,000 of the Goodrich and Firestone TBA sponsored by Texaco was purchased by Texaco dealers, for which Texaco received almost $22,000,000 in commissions. Evidence before the Commission showed that Texaco carried out its agreement to promote Goodrich products through constantly reminding its dealers of Texaco's desire that they stock and sell the sponsored Goodrich TBA. Texaco emphasizes the importance of TBA and the recommended brands as early as its initial interview with a prospective dealer and repeats its rec-

ommendation through a steady flow of campaign materials utilizing Goodrich products. Texaco salesmen, the primary link between Texaco and the dealers, promote Goodrich products in their day-to-day contact with the Texaco dealers. The evaluation of a dealer's station by the Texaco salesman is often an important factor in determining whether a dealer's contract or lease with Texaco will be renewed. Thus the Texaco salesmen, whose favorable opinion is so important to every dealer, are the key men in the promotion of Goodrich products, and on occasion accompany the Goodrich salesmen in their calls on the dealers. Finally, Texaco receives regular reports on the amount of sponsored TBA purchased by each dealer. Texaco contends, however, that these reports are used only for maintaining its accounts with Goodrich and not for policing dealer purchases.

Texaco urges that the facts of this case are fundamentally different from those involved in *Atlantic* because of the presence there, and the absence here, of "overt coercive practices" designed to force the dealers to purchase the sponsored brand of TBA. We agree, as the Government concedes, that the evidence in this case regarding coercive practices is considerably less substantial that the evidence presented in *Atlantic*. The *Atlantic* record contained direct evidence of dealers threatened with cancellation of their leases, the setting of dealer quotas for purchase of certain amounts of sponsored TBA, the requirement that dealers purchase TBA from single assigned supply points, refusals by Atlantic to honor credit card charges for nonsponsored TBA and policing of Atlantic dealers by "phantom inspectors." While the evidence in the present case fails to establish the kind of overt coercive acts shown in *Atlantic*, we think it clear nonetheless that Texaco's dominant economic power was used in a manner which tended to foreclose competition in the marketing of TBA. The sales

commission system for marketing TBA is inherently coercive. A service station dealer whose very livelihood depends upon the continuing good favor of a major oil company is constantly aware of the oil company's desire that he stock and sell the recommended brand of TBA. Through the constant reminder of the Texaco salesman, through demonstration projects and promotional materials, through all of the dealer's contacts with Texaco, he learns the lesson that Texaco wants him to purchase for his station the brand of TBA which pays Texaco 10% on every item the dealer buys. With the dealer's supply of gasoline, his lease on his station, and his Texaco identification subject to continuing review, we think it flies in the face of common sense to say, as Texaco asserts, that the dealer is "perfectly free" to reject Texaco's chosen brand of TBA. Equally applicable here is this Court's judgment in *Atlantic* that "It is difficult to escape the conclusion that there would be little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers." 381 U. S., at 376.

We are similarly convinced that the Commission was correct in determining that this arrangement has an adverse effect on competition in the marketing of TBA. Service stations play an increasingly important role in the marketing of tires, batteries, and other automotive accessories. With five major companies supplying virtually all of the tires that come with new cars, only in the replacement market can the smaller companies hope to compete. Ideally, each service station dealer would stock the brands of TBA that in his judgment were most favored by customers for price and quality. To the extent that dealers are induced to select the sponsored brand in order to maintain the good favor of the oil company upon which they are dependent, to that extent the operation of the competitive market is adversly

affected. As we noted in *Atlantic*, the essential anticompetitive vice of such an arrangement is "the utilization of economic power in one market to curtail competition in another." 381 U. S. 357, 369. Here the TBA manufacturer has purchased the oil company's economic power and used it as a partial substitute for competitive merit in gaining a major share of the TBA market.[3] The nonsponsored brands do not compete on the even terms of price and quality competition; they must overcome, in addition, the influence of the dominant oil company that has been paid to induce its dealers to buy the recommended brand. While the success of this arrangement in foreclosing competitors from the TBA market has not matched that of the direct coercion employed by Atlantic, we feel that the anticompetitive tendencies of such a system are clear, and that the Commission was properly fulfilling the task that Congress assigned it in halting this practice in its incipiency. The Commission is not required to show that a practice it condemns has totally eliminated competition in the relevant market. It is enough that the Commission found that practice in question unfairly burdened competition for a not insignificant volume of commerce. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *United States* v. *Loew's, Inc.*, 371 U. S. 38, 45, n. 4 (1962); *Atlantic Refining Co.* v. *FTC*, 381 U. S. 357, 371 (1964).

The Commission was justified in concluding that more than an insubstantial amount of commerce was involved. Texaco is one of the nation's largest petroleum companies. It sells its products to approximately 30,000

[3] The Commission's conclusion that under a sales commission plan, a dealer would not make his choice solely on the basis of competitive merit was bolstered by the testimony of 31 sellers of competing, nonsponsored TBA that they were unable to sell to particular Texaco stations because of the dealers' concern that Texaco would disapprove of their purchase of nonsponsored products.

service stations, or about 16.5% of all service stations in the United States. The volume of sponsored TBA purchased by Texaco dealers in the five-year period 1952–1956 was $245,000,000, five times the amount involved in the *Atlantic* case.

For the reasons stated above, we reverse the judgment below and remand to the Court of Appeals for enforcement of the Commission's order with the exception of paragraphs five and six of the order against Texaco, the setting aside of which by the Court of Appeals the Government does not contest.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1968.

Federal Trade Commission, Petitioner, v. Texaco, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December 16, 1968.]

Mr. Justice Harlan, concurring.

I join the Court's opinion, with the following statement. To the extent that my action in joining today's opinion is inconsistent with my action in joining Brother Stewart's dissent in *Atlantic Rfg. Co.* v. *FTC*, 381 U. S. 357, 377 (1965), candor compels me to say that further reflection has convinced me that the portions of the Commission's order which the Court today sustains were within the authority granted to the Commission under § 5 of the Federal Trade Commission Act.

SUPREME COURT OF THE UNITED STATES

No. 34.—October Term, 1968.

Federal Trade Commission, Petitioner, v. Texaco, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[November 25, 1968.]

Mr. Justice Harlan, concurring.

I join the Court's opinion, with the following statement. To the extent that my action in joining today's opinion is inconsistent with my dissent in Atlantic Rfg. Co. v. FTC, 381 U.S. 357, 377 (1965), candor compels me to say that further reflection has now persuaded me that the portions of the Commission's order which the Court today sustains were within the authority granted to the Commission under § 5 of the Federal Trade Commission Act.

SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1968.

Federal Trade Commission, Petitioner, *v.* Texaco, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December 16, 1968.]

Mr. Justice Stewart, dissenting.

We are told today that "[t]he sales commission system for marketing TBA is inherently coercive." If that is so, then the Court went to a good deal of unnecessary trouble in *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U. S. 357, 368, to establish that Atlantic "not only exerted the persuasion that is a natural incident of its economic power, but coupled it with direct and overt threats of reprisal . . . ."

The Court acknowledges that "the evidence in this case regarding coercive practices is considerably less substantial than the evidence presented in *Atlantic.*" But that is an understatement. For the fact is that in this case the Court of Appeals was totally unable to "find that Texaco used its controlling economic power to compel its dealers to purchase sponsored TBA." 383 F. 2d 942, 949. That is why this Court must perforce create today's *per se* rule of "inherent" coercion.

For the reasons set out at some length in my separate opinion in *Atlantic, supra,* at 377, I cannot agree to any such *per se* rule. Accordingly, I would affirm the judgment of the Court of Appeals.